

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

DILLARD’S INC.

Employer

and

Case No. 26-RC-8189

**UNION OF NEEDLETRADES, INDUSTRIAL,
AND TEXTILE EMPLOYEES**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.²

INCLUDED: All Shipping, Receiving, Bulk, Hang, Flat Consolidated, Refusal, Alterations, Housekeeping, Maintenance, DC Traffic and Internet Store employees

EXCLUDED: All Accounts Payable, Associate Services, Industrial Engineering, Corporate Traffic, Reservations, Carpenter, Escalator Repair, POS Repair, Video Production, Furniture Repair and Delivery, Sign Shop, office clericals, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are the employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Union of Needletrades, Industrial and Textile Employees.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election

should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the National Labor Relations Board, Region 26, 1407 Union Avenue, Suite 800, Memphis, Tennessee 38104-3627 on or before **August 4, 2000**.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **August 11, 2000**.

DATED, at Memphis, Tennessee, this 28th day of July 2000.

/s/

Ronald K. Hooks, Regional Director
Region 26, National Labor Relations Board
1407 Union Avenue, Suite 800
Memphis, TN 38104-3627

1/ The Petitioner and Employer filed briefs which have been duly considered.

2/ At the hearing the Petitioner amended the unit description as follows: Included: All employees in the departments of Shipping, Receiving, Flat Consolidated, Hanging, Bulk, Internet Store, Maintenance, Housekeeping, Alterations, Refusals and DC Traffic. Excluded: All employees in the departments of Accounts Payable, Engineering Clerical, Associate Services, Video, Sign Shop, Reservations, Furniture Delivery, Furniture Repair, Escalator Repair, Carpenter, POS Repair and Corporate Traffic, office clerical employees, guards and supervisors as defined in the Act. The Petitioner stated it is willing to go to election in any unit the Regional Director finds appropriate and that if the Director finds a smaller unit appropriate, the Petitioner seeks a separate election to represent those for whom it petitioned but who are excluded. All employees included in the unit that the Petitioner seeks to represent earn, on average, \$8.00 to \$12.00 per hour. The parties stipulate that Dillard's, Inc. is a Delaware corporation that operates retail stores in several states. The Employer operates a distribution center in Little Rock, Arkansas. During the past twelve months, a representative period, the Employer has received goods valued in excess of \$50,000 at the Little Rock facility which were shipped to it directly by suppliers located in other states. During the same representative period, the Employer had retail sales in excess of \$500,000.

EMPLOYER AND FACILITY

Dillard's operates 340 to 380 retail stores located throughout the United States. Corporate headquarters occupy two buildings in downtown Little Rock, Arkansas. The corporation comprises several divisions, including the Little Rock division. The Little Rock Division includes retail stores in Arkansas, North Carolina, South Carolina, and parts of Tennessee, Mississippi and Louisiana as well as its distribution center in Little Rock which houses the employees who are the subject of this proceeding. The Little Rock distribution center, hereafter DC or Center, also houses certain corporate functions largely because there is insufficient space in the corporate offices. Testimony established that additional space is under construction and some of the functions now housed at the DC will relocate to corporate space. It is unclear when this will occur or which offices will be moved.

The Center is a large, mostly open facility with a second floor referred to as the mezzanine. Receiving docks are located along the south side of the building and shipping docks occupy the opposite side of the building. The entire facility is air-conditioned but the temperature in the offices is more consistent and comfortable. The shipping, receiving, flat consolidated, bulk and hang departments occupy the vast majority of warehouse floor space. The internet store occupies the next largest space along the east side of the building, adjacent to bulk and hang departments. Alterations occupies a small enclosed space on the west side of the building. Along the west side of the building are two large enclosed sets of offices sometimes referred to as the “front office.” Located within the front office are accounts payable, associate services, corporate traffic, reservations, and the escalator repair departments and a break room. In a separate adjacent office is the industrial engineering department. The second floor, referred to as the mezzanine, is divided into two parts. One half is devoted to flat consolidated, hereafter referred to as flatcon, which is situated directly above the flatcon area downstairs. The other half of the mezzanine houses the hang department which sits atop the bulk department. Flatcon mezzanine also houses a very small refusals area and an equally small enclosed video area/photo studio which abut the employee lunch room. A third break room is on the first floor near flatcon and an outside smoking/break area is located just outside the Center’s entrance. The sign shop and DC traffic occupy separate enclosed spaces to the rear of the flatcon area. POS repair and maintenance occupy small adjacent enclosed spaces behind the bulk department. Furniture repair and delivery and the carpenter area share a work space in the southeast corner of the building.

DISTRIBUTION CENTER OPERATIONS

The Employer’s buyers order merchandise from vendors who send it to the distribution center where receiving department employees unload the shipments. Bulk, hang and flatcon department employees open boxes, check the merchandise, scan, tag and record the merchandise. At each step of the process employees in the various departments track merchandise using scanners and computers. When merchandise is verified and processed it moves along conveyor belts to the shipping department where it is packed and loaded onto trucks for shipping to Dillard’s stores within the Little Rock

Division. Employees in the following classifications are sometimes referred to by the parties as “processing area employees”: Shipping, Receiving, Bulk, Hang, Flatcon, Refusals, Alterations, and Internet Store.

TERMS AND CONDITIONS OF EMPLOYMENT

The parties stipulate that the standards set forth in the Employer’s Associate Work Rules, General Policies and Benefits booklet apply to all those employed by the Employer, both employees and management. The booklet covers, among other things, policies on attendance, vacation, insurance, dress code, drug policy, discipline and holidays. The booklet specifically reserves to the Employer the right to add or change terms and conditions of employment at will.

Dress code appears to be a policy which distinguishes some employees from others. Thus, the handbook, which applies to retail store employees as well as distribution center employees, requires, among other things, that employees wear coordinated suits (with jackets) or dresses with dress shoes and prohibits wearing jeans or jeanlike material. The handbook exempts warehouse employees from these rules. Thus, the exemption applies to “[a]ssociates who work only in non-sales related areas where manual labor is performed, and direct contact with the public is not customary.” Record testimony established that employees who work in the processing areas are required, in addition to the rules set forth in the handbook, to wear safety shoes. They may also wear shorts to work.

All employees use the same entrance to the facility, the same breakrooms, lunchroom and parking areas. All employees wear badges and all clock in at one of two timeclocks. There are two timeclocks; one for those who work in the warehouse area itself and the other for office employees. Maintenance and housekeeping employees provide service to all areas of the facility.

Nearly all processing area hourly employees are paid according to an incentive system called Base Plus. Such employees are referred to as “Base Plus Operators.” The Base Plus system provides eligible employees with additional wages computed by measuring employee accuracy, skill, effort and time management. These factors are tracked by computer using data input by the employees. Another smaller set of hourly

employees, referred to as “Support Operators”, are paid an incentive calculated as a percentage of the average Base Plus wages paid to others in the same department. Support employees work in the same departments as base plus operators but perform tasks which cannot be measured in a comparable way. The remaining hourly employees are paid a straight wage rate per hour.

Any employee in the Center is free to request a transfer to another department. The requesting employee completes a transfer request form, has it signed by his manager and submits it to the personnel department referred to as Associate Services. Managers and directors testified that they give preference to internal candidates when there are openings in their departments and rely on Associate Services to maintain and make available the forms for those who have requested transfers. The record is replete with examples of employee transfers among the various departments.

UNIT STIPULATIONS

The parties stipulate and I find that all employees within these classifications share a community of interest and are eligible to vote: Shipping, Receiving, Flatcon, Bulk, Hang, Alterations, Refusals, and Internet Store. Employees in each of the foregoing classifications work on the floor of the distribution center, follow the same dress code, are subject to the same safety rules, are paid by the hour, use similar tools and handle merchandise. In agreement with the parties’ stipulation I further find that Maintenance and Housekeeping employees share a community of interest with the processing area employees and are eligible to vote. While Maintenance and Housekeeping employees do not handle merchandise the record establishes that they are subject to the same general terms and conditions of employment and they work in all parts of the building thus frequently coming into contact with processing area employees. Also in agreement with the parties’ stipulation I find the two employees in DC Traffic share a community of interest with processing employees and are included in the unit. With respect to the DC Traffic employees I rely specifically upon the interaction between DC Traffic employees and Receiving Department employees to investigate merchandise discrepancies.

The parties further stipulate and I find that the following classifications should be excluded from any election that is directed: office clerical, truck maintenance, yard drivers, professional employees and supervisors as defined by the Act.

The parties stipulate and I find that all presidents, vice presidents, directors and managers are supervisors within the meaning of Section 2(11) of the Act and are ineligible to vote on the grounds that each exercises independent judgment to hire, fire, transfer or promote employees or to effectively recommend such actions.

DISPUTED CLASSIFICATIONS

In addition to the stipulated classifications the Employer would include and the Petitioner would exclude all employees in the following departments: Accounts Payable, Associate Services, Engineering Clerical, Corporate Traffic, Carpenter, Escalator Repair, Delivery, Furniture Repair, POS Repair, Reservations, Video and Sign Shop. The Employer contends that the only appropriate unit includes all departments in the Center because all employees share a substantial community of interest and a common purpose of providing services and product to the employer's retail store operations. The Union maintains that the petitioned-for unit is appropriate because it performs typical warehouse functions such as shipping and receiving or integrated ancillary functions such as alterations and refusals.

A. Accounts Payable, Industrial Engineering, Associate Services, Corporate Traffic and Reservations

1. Accounts Payable - This department handles all accounts payable functions for the entire corporation. Fifty hourly employees working in cubicles at desks with computers are responsible for paying all valid invoices from vendors and for researching and resolving disputed claims. Accounts Payable employees rely on data input to the computer system by employees located throughout the company's stores and distribution centers. They work in the carpeted office area and spend their time working on computers and corresponding with vendors. Interaction with processing employees is limited to break times and areas. Wage

rates range from 8.50 to 13.50 per hour. They adhere to the dress code for other office employees which prohibits jeans and shorts and permits open-toed shoes. Accounts Payable employees, unlike processing area employees, are not subject to random drug testing and do not attend safety meetings. Applicants are required to have some experience with a computer, but no specific educational attainment. Hours of work are generally 7:30 to 4:00. Industrial Engineering Manager Richard Blair testified that Accounts Payable is a corporate function.

2. Industrial Engineering – The Industrial Engineering Department handles payroll. Store Industrial Engineering Manager Richard Blair testified that that his department is located in the Center for two reasons: first, there is insufficient space at corporate headquarters and second, because Vice President Mike Bowen, to whom Blair reports, prefers to maintain his office in a distribution center and prefers to have his employees at the same site. Engineering Clericals in the department process payroll for all retail stores in the corporation. The record does not reflect how many employees are in the Engineering Clerical classification. Three other employees, Engineering Statisticians, handle payroll for all employees at the Little Rock Distribution Center. All the employees work in partitioned work stations with desks and computers in a carpeted area adjacent to the larger front office. Engineering Statisticians generate productivity reports circulated among managers and posted for employees. They also produce “green sheets” documents provided weekly to employees which show a projection for each employee’s upcoming pay check and the method of calculation. It appears that advance explanation is useful because employees on the Base Plus system receive checks which may vary from week to week. Sometimes employees with questions about a green sheet will visit the Engineering area and meet with Manager Alan Dorman or an Engineering Statistician to clarify entries.

Department managers and engineers travel extensively to set up systems for new stores and to provide training for dock and operations managers. One employee, an Administrative Assistant, reports directly to Blair and coordinates

flight, hotel, and other travel arrangements for department managers and engineers. The Administrative Assistant works in the Corporate Traffic area and her hours are 8:00 am to 2:30 pm.

3. Associate Services – Associate Services is the Center’s personnel department. Its employees maintain applications, interview applicants, process transfer requests, provide assistance to all departments to fill open positions, and handle employee questions related to insurance, scheduling and attendance. Associate Services employees work in the front office area, clock in along with other office employees and adhere to the office dress code. They work in partitioned work stations and use computers. The record does not reflect the number of employees working in Associate Services.

4. Corporate Traffic – Like all other office employees, none of the Corporate Traffic employees is subject to random drug testing or safety regulations. They adhere to the office dress code and they work in partitioned work stations at computer terminals. Corporate Traffic applicants are required to type 25 to 30 words per minute, use ten-key by touch and have some knowledge of computer functions enabling them to do data entry, spreadsheet work and word processing. Manager Blair acknowledged that there is no work-related reason for processing area employees to come into the corporate traffic office or vice versa. The record does not reflect the number of employees in Corporate Traffic.

In each of Dillard’s distribution centers the Distribution Center Traffic employees perform initial investigations to resolve merchandise discrepancies. Initial investigations require interaction between DC Traffic employees and their respective Receiving Department employees. DC Traffic employees check original paperwork, monitor subsequent receipts and prepare claim forms for loss or damage for submission to the carrier.

When DC Traffic employees complete their work they provide a copy of the claim form to Corporate Traffic whose Freight Claims and Payment employees take over the process of resolving disputed claims. These employees

investigate discrepancies, monitor subsequent receipts to determine whether shortages have been corrected, and correspond with carriers regarding disputed claims until each matter is resolved.

A second section in Corporate Traffic, Volume Shipping employees, receive shipping data from vendors, enter it into a software program and receive a printout which provides the optimal way to combine loads for shipping. In accordance with the printouts the employees book shipments with carriers and advise distribution centers of the numbers of trailers and their loads expected each day.

Import Department employees comprise the third section of Corporate Traffic. They monitor product movement and customs clearance for all merchandise purchased overseas. They receive shipping documents from vendors and thereafter track the shipment from consolidator, onto the steamship line, through customs and through the local trucking company that moves containers from port of entry in Los Angeles to the distribution center at Gilbert, Arizona. Import Department employees deal with buying agents and vendors to resolve disputes and maintain and conduct audits of import records. Their work most directly affects the scheduling of employees at the Gilbert distribution center.

5. Reservations - When customers place orders for merchandise in stores which do not have the product in stock, typically furniture or tableware, the sales clerk at the store contacts Reservations employees who take the order, locate the merchandise and arrange for its delivery to the nearest distribution center where it is received, checked and delivered to the ordering store or directly to the customer. Reservations employees work in cubicles at computer terminals, performing all their duties electronically. They do not perform any manual labor and have no work-related reason to interact with processing area employees. There is a second Reservations department located in the Fort Worth distribution center. Calls from stores route through both departments without regard to location. Reservations employees adhere to the office dress code, are not subject to safety rules and do not work with tools as do processing area employees.

APPLICABLE LEGAL STANDARDS AND ANALYSIS
OFFICE CLERICALS VERSUS PLANT CLERICALS
ACCOUNTS PAYABLE, INDUSTRIAL ENGINEERING, ASSOCIATE SERVICES,
CORPORATE TRAFFIC AND RESERVATIONS EMPLOYEES

Plant clerical employees are customarily included in a production and maintenance unit because they generally share a community-of-interest with the employees in the plantwide unit. Raytec Co., 228 NLRB 646 (1977); Armour & Co., 119 NLRB 623 (1957). The Board applies community-of-interest factors to determine whether to include clerical employees in a bargaining unit with warehouse personnel. NLRB v. Big Three Industries, Inc., 602 F.2d 898, 902-03 (9th Cir. 1979). Office clericals, on the other hand, are excluded from a production and maintenance unit. Hygeia Coca-Cola Bottling Co., 192 NLRB 1127, 1129 (1971); Westinghouse Electric Corp., 118 NLRB 1043 (1957). Although office clericals may be under the same supervision as plant clericals and share the same mode of compensation, they are typically excluded from a production and maintenance unit, while plant clericals are included. Lilliston Implement Co., 121 NLRB 868, 870 (1958).

The factors relevant to deciding this issue are: **(1)** similarity in skills, interests, duties and working conditions; **(2)** functional integration of the plant or warehouse, including interchange and contact among the employees; **(3)** the employer's organizational and supervisory structure; **(4)** the employees' desires; **(5)** the bargaining history; and **(6)** the extent of union organization among the employees. Of particular significance are skills, duties and working conditions. Accordingly, the Board may find a separate unit of warehouse employees appropriate, notwithstanding common overall supervision, common benefits, some functional overlap between warehouse and non-warehouse employees, and the dependency of warehouse operations on the paperwork generated by the clericals. Wickes Furniture, 255 NLRB 545, 548 (1981).

In the instant case, the parties agreed to exclude office clerical employees from the unit but at the hearing neither party identified any employee encompassed by that classification. On brief, the Union contends that Accounts Payable, Corporate Traffic

and Reservations employees are office clericals and should be excluded from the unit on that basis. The Employer accurately points out that all personnel in dispute, like the unit employees, are generally subject to the same personnel rules, receive an hourly wage, have a common employee handbook, and receive the same general package of fringe benefits. However, the fact that unit employees and disputed clericals share certain terms of employment does not establish that the latter are plant clerks sharing a significant community-of-interest with unit employees. Avecor, Inc., 309 NLRB 73, 75 (1992). Far more consequential factors in deciding if the clerical employees have a community-of-interest are the extent of interchange among clerical and unit employees, the nature and degree of their work-related contacts with one another, and their skills, duties, and working conditions. Wickes Furniture, 255 NLRB at 548.

In that regard the record establishes that the employees in Accounts Payable, Industrial Engineering, Associate Services, Corporate Traffic and Reservations do not work in a similar environment, wear the same clothing, handle the same or similar tools or perform manual labor as do unit employees. Similar to disputed clerical employees in Fisher Controls Company, 192 NLRB 514 (1971), the disputed clericals here do not have a direct and immediate role in the process of receiving customer orders, preparing picking tickets and invoices, and compiling shipping and receiving records. They do not perform the physical tasks involved in compiling merchandise or loading vehicles, and they do not perform clerical functions on or in proximity to the shop floor in association with the unit employees. Rather, they have markedly different working conditions, job skills and duties, separate immediate supervision, and work in physically separate offices. Their contacts and interchange with unit personnel are limited and sporadic, unlike the clerical personnel in Roskin Brothers, Inc., 274 NLRB 413 (1985), or Ives Business Forms, 263 NLRB 286, 289 (1982), who regularly interacted with warehouse personnel in processing customer orders. Moreover, the record amply shows that employees who perform the functions the Board traditionally associates with plant clericals in a warehouse distribution operation are included in the unit. These are the employees in each processing department who spend all or the greatest part of their work day operating a computer terminal on the warehouse floor in direct communication with and surrounded by other unit employees and their working

environment. These employees performing traditional plant clerical functions are referred to in the record only in general terms. However, the record includes photographs of their work stations and reflects these employees hold the same title as others in their classification, e.g., receiving associate, shipping associate. The record does not identify the number of these employees or their names.

With respect to the Reservations employees, the Employer contends that the Board's holding in J.C. Penney Company, Inc., 328 NLRB N0. 105 (June 18, 1999) which includes telemarketers in a larger unit of warehouse employees is instructive. I disagree. J.C. Penney telmarketers, unlike the Reservations employees in the instant case, initiate the work process for other employees in the warehouse. Thus, J.C. Penney telemarketers take customer orders directly by telephone and prepare order forms which flow directly to their co-workers on the floor who fill the orders for immediate shipment to the customer. On these facts, telemarketers and warehouse employees are functionally integrated; they are parts of the same, distinguishable distribution chain serving the same set of customers. Further, in J.C. Penney the telemarketers have substantial contact and interchange with warehouse employees. They communicate regularly concerning specific orders and tickets. In the Dillard's distribution center, there is neither functional nor physical integration among these classifications. The Reservations employees take orders from stores located all over the country. If the order flows through the Little Rock Distribution Center it is only a matter of geographical convenience. For all practical purposes the Reservations Department stands alone and could be located anywhere. Significantly, the Reservations employees have little or no contact with unit employees. The Employer's reliance upon John N. Hanson Co., 293 NLRB 63 (1989), is also misplaced. Like the telemarketers in J.C. Penney the single employee in dispute in John N. Hanson initiates work for the employees with whom she shares a warehouse. She works daily and directly with warehouse employees. Such interaction is not present at Dillard's.

Based upon the foregoing I find that employees in the Accounts Payable, Industrial Engineering, Associated Services, Corporate Traffic and Reservations departments are office clerical employees and shall be excluded from the unit. Four individuals, Flora Green, Faye Mashburn, Dwayne Morgan, and Brenda Smith are named

in the record as Accounts Payable supervisors. There is no further evidence regarding their duties. In light of my finding that Accounts Payable hourly employees should be excluded from the unit on the grounds that they are office clericals, I make no finding regarding the supervisory status of the four named individuals.

APPLICABLE LEGAL PRINCIPLES – APPROPRIATE UNIT

Section 9(b) of the Act states that "the Board shall decide in each case whether, to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, or subdivision thereof."

The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act requires only that the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." See, e.g., Morand Bros. Beverage Co., 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951) and Dezcon, Inc., 295 NLRB 109 (1989). A union is not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." Purity Food Stores, 160 NLRB 651 (1966). In determining whether a petitioned-for unit is appropriate, the Board recently affirmed that the unit sought by the petitioning union is always a relevant consideration. The Lundy Packing Company, Inc., 314 NLRB 1042, 1043 (1994), citing E.H. Koester Bakery & Co., 136 NLRB 1006 (1962).

B. Carpenter and Escalator Repair Employees

One employee is a Carpenter who is responsible for all carpentry work in all stores in the division. His work takes him away from the Center up to a week at a time. He is highly skilled, uses carpentry tools and is paid substantially more per hour than any unit employee. He receives per diem for his time on the road. When in the Center the carpenter spends time in the shop, building benches, shelves or tables which he sends or takes to the stores. He occasionally performs some services in the Center. For example, he has spent several days recently reconfiguring the sign shop. However,

Manager Bingham testified that the carpenter spends 60 to 70 percent of his time away from the DC and on the road. The record establishes that the carpenter position could only be filled by a person with well-honed skills.

Two employees work in Escalator Repair. Like the carpenter, escalator repair employees spend a substantial portion of their time, sometimes weeks at a time, working in the stores within the Division. The remainder of their time, when they are in the DC, they work in their shop on projects brought or shipped from other locations. Like the carpenter, escalator repair employees are highly skilled, receive per diem for travel and are paid a substantially higher hourly rate than unit employees. The record fails to establish that escalator repair employees perform any work for the Center itself.

With regard to Carpenter and Escalator Repair employees, the Employer asserts their exclusion would constitute the formation of an inappropriate residual unit. However, the cases cited by the Employer, Flemming Foods, Inc., 313 NLRB 948 (1994) and Montgomery Ward & Co., Inc., 259 NLRB 280 (1981), do not stand for the proposition that the employees excluded, herein, would constitute an inappropriate residual unit. In Flemming, the Board held that a separate warehouse clerical unit was inappropriate since it did not include all other remaining unrepresented employees. Similarly, Montgomery Ward establishes that in a residual unit it would be improper to exclude any unrepresented segment or classification. In sum, there is no issue in the instant case pertaining to what constitutes an appropriate residual unit.

On the foregoing facts I find the Carpenter and Escalator Repair employees do not share sufficient community of interest with unit employees. I find it particularly persuasive that these employees possess special skills that unit employees do not possess and that they have virtually no interaction with unit employees. Indeed, they are not present at the DC for substantial periods of time. Accordingly, I shall exclude the Carpenter and Escalator Repair employees from the bargaining unit.

C. POS (presumably “point of sale”) Repair and Video Production Employees

1. POS Employees work in a department comprising four sections: RF (radio frequency) Repair, POS Repair, PC (computer) Repair and Printer Repair. Respectively, they repair scanners, cash registers, computers and printers for all Employer stores and for all but one of the Employer's distribution centers. Scanners are ubiquitous and nearly every processing area employee uses them to record merchandise data in one or more of the various computer systems. Computers and printers are at each desk in the front office and sprinkled liberally throughout the processing areas. Most cash registers are, of course, located in the retail stores but there is also a cash register situated in the Internet Store.

The POS Repair employees do most of their work in a shop at the DC. Broken equipment is shipped to the DC by Dillard's truck or by another carrier and transported to the shop by a Receiving Department or RF Repair employee. Ninety to 95 percent of the RF work is done in the shop; 80 percent of Printer Repair is done in the shop and 70 percent of the PC Repair is done in the shop.

POS employees who actually repair equipment must have electronics training or equivalent work experience. Managers recruit new hires through local technical schools and, unlike other departments, prefer to hire from the technical schools rather than from within the Center's workforce. Except for an hourly-paid RF Administrative Assistant, whose duties are not discussed in the record, RF Repair employees are salaried technicians, earning within the low \$20,000 to low \$30,000 range. Except for two hourly employees whose titles and duties are not discussed on the record, POS Repair employees are salaried technicians paid similarly to RF Repair technicians. In Printer Repair there is an hourly-paid Administrative Assistant who handles paperwork for work orders and transfers and a second hourly-paid employee who handles shipping and receiving. Completing the Printer Repair section are two salaried technicians who earn approximately \$30,000 per year and are required to have at least an Associate's Degree in electronics.

There is one salaried employee in PC Repair who, along with the section Supervisor, repairs computers and servers. They spend approximately 30 percent of their time providing advice by telephone to users throughout the Employer's company.

The technician earns between \$30,000 and \$35,000 per year. When he travels he is paid mileage expenses and, on multi-week assignments, per diem.

All POS technicians have badges which permit access to corporate offices as well as the Center. POS employees dress is casual; shorts are not permitted but jeans are worn on Friday. POS employees are not subject to safety rules. There are approximately 19 employees in this classification.

2. Video Production

Three salaried technicians in the Video Production department write, shoot and edit training videos, run dubs of tapes and produce introductions for the videos. The videos may be designed for store or distribution center employees, depending upon the subject but the overwhelming number of videos the technicians produce deal with store employee issues. Corporate employees and professional actors are employed to act in the videos although occasionally an employee will play an extra in the program. The technicians, all college graduates, earn approximately \$36,000 per year, produce approximately 3 videos per month and report to Director of Corporate Training at headquarters. Other than the occasional shoot on the Center floor, the technicians do not interact with employees in the processing areas. They travel overnight from 3 to 7 times per year on average.

ANALYSIS AND DISCUSSION – POS REPAIR AND VIDEO PRODUCTION EMPLOYEES

Technical employees are those “who do not meet the strict requirements of the term ‘professional employee’ as defined in the Act but whose work is of a technical nature involving the use of independent judgment usually acquired in colleges or technical schools or through special courses.” Audiovox Communications Corp., 323 NLRB 647 (1997), citations omitted.

Except for the five hourly employees, discussed separately, POS employees are salaried and earn from \$20,000 to \$35,000 per year. When on travel status the technicians are paid per diem. All have specialized training or equivalent work experience. Most, if not all, hold at least Associates Degrees. Unlike most other departments, managers recruit new hires through local technical schools rather than

relying on internal candidates. Employees in all other departments included in the unit require no specific educational attainment; training is done on the job by other employees.

Similarly, Video Production employees hold Associate's or Bachelor's degrees. They exercise independent judgment and artistic creativity in the process of their work. They are salaried and occasionally travel on business.

Based on the foregoing I find that the POS Repair and Video Production are technical employees or, in the alternative, do not share sufficient community of interest with unit employees and I shall exclude them from voting eligibility.

In POS there are two Administrative Assistants and three other hourly employees whose names and titles do not appear in the record. However, since I have alternatively found that the other POS employees do not share sufficient community of interest to be included in the unit, I shall exclude from the unit the two Administrative Assistants and the other three hourly employees in the POS Department for the same reason.

D. Furniture Repair and Delivery

Orders placed with Reservations for the Little Rock Division are delivered to the DC at the Furniture Delivery dock where six hourly employees, all drivers or helpers, unload the truck and check the merchandise for damages. If merchandise needs repair the Delivery employees take it to the Repair shop where one employee repairs the damages and prepares the merchandise for shipping to the store or directly to the customer. Delivery employees load and unload their trucks early, beginning at 6:30 am. Once these tasks are complete, usually by 9:00 am, the drivers and helpers leave to make deliveries and do not return to the DC for the remainder of the work day. They do not make overnight runs but rather restrict their service area to within a 70 to 75 mile radius of the Center. The department operates Tuesday through Saturday. Supervisor Michels testified that Furniture Delivery and Repair employees have little interaction with other warehouse employees. The delivery employees have considerable interaction with customers. They wear uniforms provided by the Employer.

Based upon the foregoing I find the Furniture Delivery and Repair employees do not share sufficient community of interest with unit employees. I find compelling the fact that Furniture Delivery employees have virtually no interaction with unit employees and, in fact, spend little time at the Distribution Center. Instead, they spend most of their time in trucks and working with customers. The Furniture Repair employee possesses and employs skills not required in any other warehouse position. He works alone in a shop and his interaction with unit employees is sporadic if it occurs at all. Consistent with my findings regarding the Carpenter and Escalator Repair employees I conclude that the cases cited by the Employer are inapt because there is no issue regarding a residual unit in the instant case. Accordingly, I shall exclude the Furniture Delivery and Repair employees from the unit. Supervisor Michael Michels spends most of his time at the computer and handling paperwork. He also intercedes when drivers or helpers encounter difficult customers. I find that, like the other hourly employees in the Furniture Delivery and Repair department, Michels has little or no interaction with processing area employees and I shall exclude the Furniture Delivery and Repair Supervisor from the unit. As the position of Furniture Delivery and Repair Supervisor is excluded from the unit because it does not share a community of interest with unit employees, I make no finding regarding whether the position exercises supervisory authority within the meaning of the Act.

E. Sign Shop

There are four hourly employees who work in the Sign Shop. They produce signage for advertising promotions for all 87 stores in the Little Rock Division. A similar operation is housed in each distribution center to serve its respective division's stores. The employees work on machines to create their signs and after production they package the signs in cardboard and take them to distribution points within the Center's Shipping department where they are loaded onto trucks for delivery to the stores. Sign shop employees are subject to random drug testing and their wage rate ranges from \$13 to \$14.50 per hour. Incumbents have from 17 to 35 years of experience. The employees exercise a fair amount of artistic freedom; they create approximately 80 percent of the signs while the remaining signs are produced at corporate headquarters.

Each of the employees has skill or training in drafting, sketching, copy or art but no special skill or training is required to be hired.

Based on the foregoing I find the Sign Shop employees do not share sufficient community of interest with unit employees. While their skills may not be considered technical as the Board has construed that term, artistic work of the sort produced by these employees cannot be created by individuals without special training or skill. They work independently, without on-site supervision. Like Furniture Delivery employees, interaction with warehouse employees is nearly non-existent. Accordingly, I shall exclude the Sign Shop employees from the unit.

DISPUTED SUPERVISORS – LEGAL STANDARDS AND ANALYSIS

Section 2(11) of the Act, 29 U.S.C. Section 152, states:

The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In determining whether a person is a statutory supervisor, the Board holds that a person must possess only one of the specific responsibilities listed in Section 2(11). Applying Section 2(11) to the duties and responsibilities of any given person requires that the Board determine whether the person in question exercises any of the functions listed in Section 2(11), uses independent judgment in performing any of those supervisory functions, and does so in the interest of management. Hydro Conduit Corp., 254 NLRB 433, 437 (1981). As pointed-out in Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in Hydro Conduit Corp.: "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect."

In enacting Section 2(11), Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors,

and not "straw bosses, leadmen, setup men and other minor supervisory employees." See *Senate Rep. No. 105, 80th Cong., 1st Sess. 4, reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947*. The Board has long recognized "there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate employees," who nevertheless are not supervisors within the meaning of the Act, since their authority is based on their working skills and experience. Koons Ford of Annapolis, 282 NLRB 506, 513-514 (1986), enf'd. 833 F.2d 310 (4th Cir. 1987), cert. denied 485 U.S. 1021 (1988).

Moreover, the party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. Golden Fan Inn, 281 NLRB 226, 229-230 fn. 12 (1986). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991). Furthermore, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." Phelps Community Medical Center, 295 NLRB 486, 490 (1989).

HOURLY SUPERVISORS

The final category of disputed employees are classified as hourly-paid supervisors. Each was called a lead person until last March when the Plant Manager changed their titles to supervisor. Although titles changed, their duties and pay did not.

The Petitioner contends Housekeeping Supervisor Carolyn Eubanks is a supervisor within the meaning of Section 2(11) of the Act. The record establishes that Eubanks has interviewed and hired at least one employee without consulting Manager Tindel. She is paid substantially more per hour than other employees in the department and she trains most new employees, working side by side with them for the first two weeks. On brief, the Employer concedes that Eubanks is a statutory supervisor. In accordance with the parties' agreement and in view of the foregoing facts, I find that the Housekeeping Supervisor is a

supervisor within the meaning of the Act and I shall exclude the Housekeeping Supervisor from the unit.

With regard to the remaining individuals who are also classified as hourly supervisors the record establishes that despite their common titles, the extent to which they hold or exercise authority in respect to the terms and conditions of employment of other employees is widely varied. Thus, for those listed below as Group A of these disputed employees, the record firmly establishes that none has the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend such action. Accordingly, I shall include them in the unit eligible to vote.

Group A – Included in the Unit

Carolyn Green – Bulk Supervisor; Day Shift

Davineen (Daisy) Warner – Bulk Supervisor. Day Shift

Chenell Smith – Bulk Supervisor, Night shift

Timica Robinson – Flatcon Supervisor, Night Shift

Angie Long – Flatcon Supervisor, Night Shift

For those in Group B, the record evidence is insufficient to determine whether they possess or exercise sufficient authority to render them supervisors within the meaning of the Act. Accordingly, Group B employees may vote in the election, subject to challenge.

Group B – Eligible to Vote, Subject to Challenge

Kathy Bowden – Hang Supervisor, Day Shift

Charlene McDaniel – Hang Supervisor, Day Shift

James Burks – Shipping Supervisor; Night shift

Lisa Paulie – Hang Supervisor, Night Shift

Sharon Forrester – Flatcon Supervisor, Day Shift

Rose Kincaid – Flatcon Supervisor, Day Shift

Kathy Finley – Refusal Supervisor

Jason Martin – Receiving Supervisor

Scott Easterly – Maintenance Supervisor

Denise Patterson – Internet Store Supervisor; Night Shift

. Although the record testimony does not include a firm number, the Petition filed by the Petitioner indicates there are approximately 450 employees in the unit found appropriate herein.

CLASSIFICATION INDEX

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420-2900

440-1760-2960

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